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14-03-2011

Reference O000015EP: MA	Application No./Patent No. 04706911.7 - 2318 / 1589810
Applicant/Proprietor DeLaval Holding AB	

Summons to attend oral proceedings pursuant to Rule 115(1) EPC

You are hereby summoned to attend oral proceedings arranged in connection with the above-mentioned European patent.

The matters to be discussed are set out in the communication accompanying this summons (EPO Form 2906).

The oral proceedings, which will be public, will take place before the opposition division

on 01.12.11 at 09.00 hrs in Room 1653 at the EPO,
Grasserstr. 2, Pschorrhöfe, D-80335 München

No changes to the date of the oral proceedings can be made, except on serious grounds (see OJ EPO 1/2009, 68). If you do not appear as summoned, the oral proceedings may continue without you (R. 115(2) EPC).

Your attention is drawn to Rule 4 EPC, regarding the language of the oral proceedings, and to the Special edition No. 3 OJ EPO 2007, 128, concerning the filing of authorisations for company employees and lawyers acting as representatives before the EPO.

The final date for making written submissions and/or amendments (R. 116 EPC) is 01.08.11.

You are requested to report in good time beforehand to the porter in the EPO foyer. Room 1601 and 1657 are available as waiting rooms. Parking is available free of charge in the underground car park. However, this applies only in the case of accessing the car park via the entrance "Zollstrasse".

1st Examiner:
Lucas P

2nd Examiner:
Bagarry D

Chairman:
Fischer E

Legally qualified member:
Blasi M

For the Opposition Division



Annexes:
Confirmation of receipt (Form 2936)
Rule 4 EPC (EPC Form 2043)
Communication (EPO Form 2906)

Preliminary and non-binding of the opposition division

Facts and submissions

- 1 European patent No. 1 589 810 is based upon European application No. 04 706 911.7 filed as a PCT application No. WO2004/068940 on 30.01.2004.

Claimed priority: GB 9 824 090 of 04.11.1998.

SE 0300275 of 04.02.2003

The mention of the grant of the patent has been published in European Patent Bulletin 2007/52 on 26.12.2007.

Proprietor of the patent is:

DeLaval Holding AB

14721 Tumba (SE)

The granted patent includes one independent claim, claim 1, directed to a computer-controlled arrangement for housing a large number of milking animals.

- 2 Notice of Opposition was filed by:

Opponent 1 (OI) : GEA WestfaliaSurge GmbH

Siemensstrasse 25-27

59199 Bönen (DE)

with fax of 26.09.2008

Opponent 2 (OII): Octrooibureau Van der Lely N.V.

Weverskade 110

NL-3147 PA MAASSLUIS (NL)

with letter of 26.09.2008 received on 26.09.2008

- 3 In the course of the proceedings, the following evidence was submitted (the numbering of the Opposition division should be adhered to in the rest of the proceedings):
- D1 EP-A-0 608 941, cited in the search report.
- D2 EP-A-1 213 676, cited in the search report.
- D3 EP-A-0 832 558, cited in the search report.
- D4 EP-A-0 898 880, cited in the search report.
- D5 EP-A-0 566 201, cited in the search report.
- D6 (E1) Henning Luther, "Analyse der Inbetriebnahme eines automatischen Melksystem", Kiel, Juli 2000
- D7 (E1a) Bestätigung der Uni Kiel zu D6
- D8 (E2,D11) WO-A-99/63808
- D9 (E3,D12) WO-A-00/01226
- D10 (E4) Melkroboter: Das Management ist noch wichtiger als beim melkstand; top agrar 2/99 /R16-R21
- D11 (E5) Melkroboter: Rechnet sich die neue technik?; top agarar 3/97 R6-R9
- D12 (E6) Teknik Lantbruket, 1998
- D13 (E6a) Übersetzung von E6
- D14 (E7) EP-B-0 753 249
- D15 (D1) EP-A-0 898 883
- D16 (D2) WO-A-99/41977
- D17 (D3) DE-A-101 31 443
- D18 (D4) DE-A-37 02 465
- D19 (D5) DE-U-87 02 216
- D20 (D6) WO-A-96/03031
- D21 (D7) NL-C-1000474
- D22 (D8) DE-A-195 21 570
- D23 (D9) WO-A-98/00006
- D24 (D10) WO-A-99/25176

D25 (D13) WO-A-00/22919
D26 (D14) NL-C-1012445
D27 (D15) WO-A-01/17339
D28 (D16) WO-A-01/93666
D29 (D17) Pages 3-14 of a wrongly filed document, see point 9.
D30 (D18) Stable design Beenackers, 1997
D30-1 (D18-1) Sales contract, 12 August 1997
D30-2 (D18-2) Service contract, 28.02.2002
D30-3 (D18-3) Declaration (=D13 in T0801/05)
D30-4 (D18-4) print-out from Laly website (2001)
D30-5, 5A (D18-5) and 5a detail from website
D31 (D19) Stable Lathouwers, Boerdonk, 2000
D31-1 (D19-1) sales contract, 5 June 2000
D31-2A,2B (D19-2A and B) packing list, November 2000
D31-3 (D19-3) Service contract, 17 April 2002
D31-4 (D19-4) Drawing of barn design
D32 (D17) Lind O., A.H.Ipema, C.de Konig, T.T.Mottram, H.J. Herrmann (2000) Automatic milking, Bulletin of the IDF 348/2000, pp 3-14, IDF, Bruxelles, Belgium.

- 4 Opponent OI requested revocation of the patent in suit in its entirety on the grounds of lack of novelty and lack of an inventive step Article 100(a), on the ground of insufficient disclosure Article 100(b) and on the ground of added subject-matter Article 100(c). Oral proceedings was requested for the event that the opposed patent was not to be revoked.
- 5 Opponent OII requested revocation of the patent in suit in its entirety on the grounds of lack of novelty and lack of an inventive step Article 100(a). Oral proceedings was requested for the event that the opposed patent was not to be revoked.
- 6 With letter of 18.06.2009 the patentee responded to the opposition requesting to reject both oppositions and maintain the paten as granted. Auxiliary oral proceedings were requested.

7 With letter of 29.06.2009 OII filed document D32, this document should replace D29 (D17) which was filed by mistake when filing the opposition.

8 The text of claim 1 as granted reads:

A computer-controlled arrangement for housing a large number of milking animals, each of which belongs to one of a plurality of groups, said arrangement comprising:

- a resting area (1) wherein the milking animals are allowed to rest;
- a feeding area (3) wherein the milking animals are fed; and
- a milking area (5) housing at least one milking robot for milking the milking animals, wherein
 - at least one of said resting area (1) and said feeding area (3) is partitioned in sections (7,9, 11,13 ; 41,43, 45,47), the number of which corresponds to the number of said groups, to which said milking animals belong; and the arrangement further comprises
 - a device (19; 53) provided for automatically directing each of said milking animals moving towards said at least one of said resting area (1) and said feeding area (3), which is partitioned in sections, into one of said sections depending on the group, to which the respective milking animal belongs, so that each of said sections will house milking animals belonging to one only of said groups, **characterised in that**
 - said device provided for directing includes a milking animal identification device (23) provided for identifying each milking animal presenting itself in front of said device provided for directing, and a device provided for opening at least one gate (21) depending on said milking animal identification.

9 **Cited evidence:**

D32

Concerning D32 (replacement for D29), the opposition division intends to allow the requested correction under Rule 139, because it is clear from the notice of opposition that an error occurred when filing D29. In the light of the citation and the references contained in the notice of opposition, it is without any doubt that the document which OII intended to submit was D32 (filed with letter of 29.06.2009 received on 01.07.2009) which will therefore be taken

into consideration. The argument of the patentee that the document should not be allowed under Article 114(2), as it was filed late and not *prima-facie* relevant, becomes irrelevant as this is a case of a correction under Rule 139.

Public Prior Use 1: Beenackers (D30-1 - D30-5A)

OII alleges that Mr Beenackers purchased, without any obligation to secrecy, a Lely Astronaut AMS in August 1997 operation of which started in October 1997. The barn installation of Mr Beenackers forms state of the art and takes away the novelty of the subject-matter of claim 1 of the patent in suit.

It is further alleged that Mr Beenackers has shown many people around and has written extensively about his activities in Campina Kontakt.

In support of these allegations, OII filed an excerpt from a sale agreement (D32-1), an excerpt from a service contract (D30-2), a declaration from Mr Beenackers (D32-3) and excerpts from the Lely website (D30-4, D30-5, D30-5A).

The opposition division notes that where there are allegations that use or oral description are comprised in the state of the art, the opposition division must be supplied with an indication of the facts, evidence and arguments necessary for determination of the following matters:

- (i) the **date** on which the alleged use occurred, i.e. whether there was any instance of use before the relevant date (prior use);
- (ii) **what** has been used, in order to determine the degree of similarity between the object used and the subject-matter of the European patent; and
- (iii) **all the circumstances relating to the use**, in order to determine whether and to what extent it was made available to the public, as for example the place of use and the form of use.

(see in detail, Guidelines, D-IV, 1.2.2.1 (v) in combination with D-V, 3.1.2, 3.2.3).

The opposition division is of the opinion that sufficient details were provided by OII concerning the purchase of the Lely Astronaut AMS milking machine by Mr Beenackers from Lely. This complex will thus be further examined (see below).

However, sufficient details were not provided, in particular as to (i) **when** the alleged visits took place, (ii) **what** the visitors could see and (iii) **the circumstances**, e.g. who visited the barn etc. Similar considerations apply to

the allegations that Mr Beenackers has published texts in Campina Kontakt. These allegations of further prior uses can therefore not be taken into consideration.

The patentee contests the alleged prior use. In particular, he contests the presence of relevant technical features. In this respect, he argues that the declaration of Mr Beenackers does not refer to any technical features but merely to the purchase of a milking installation *per se*, and that D30-4 and D30-5 were not publicly available prior to the priority date of the opposed patent.

The opposition division is of the opinion that, on the basis of the written evidence on file, the alleged public prior use is not sufficiently proven. In particular, it is not sufficiently proven whether the delivered Lely Astronaut AMS actually comprised the alleged features and it appears not sufficiently proven whether all of the relevant features were disclosed by Lely to Mr Beenackers. It is also not sufficiently clear whether the acquisition of the machine by Mr Beenackers was an ordinary purchase or whether this occurred in the context of e.g. a test or pilot phase of the machine.

Due to the lack of sufficient proof, the Lely Astronaut AMS milking machine cannot be considered as state of the art under Article 54(2) EPC.

Public Prior Use 2: Lathouwers (D31-1 - D31-4)

OII further alleges that Mr Lathouwers purchased, without any obligation to secrecy, Lely Astronaut milking robots with serial number 10611-0537, 10609-0523 and 10609-524 on 5 June 2000 which were delivered in November 2000. Milking with those robots started in November 2000. The barn installation of Mr Lathouwers forms state of the art and takes away the novelty of the subject-matter of claim 1 of the patent in suit.

It is further alleged that Mr Lathouwers' farm was accessible for anyone wanting to inspect it.

In support of these allegations, OII filed an excerpt from a sale agreement (D31-1), packing lists (D31-2A, 2B), an excerpt from a service agreement (D31-3) and a drawing (D31-4).

The opposition division is of the opinion that sufficient details has been provided by OII concerning the purchase of the Lely Astronaut milking machine by Mr Lathouwers from Lely. This complex will thus be further examined (see below).

With regard to the alleged accessibility of Mr Lathouwers' farm, it appears however that sufficient details has not been provided with regard to the points (i)-(iii) above. The statement that "Mr Lathouwers' farm was accessible for anyone wanting to inspect it" is quite general. Therefore, these allegations will not be further considered.

The patentee contests the alleged prior use. In particular, he argues that there is no evidence as to the existence of the alleged barn layout. D30-1 did not provide corroboration in any way as to the layout and operation of the barn.

The opposition division is of the opinion that, on the basis of the written evidence on file, the public prior use is not sufficiently proven. In particular, it is not sufficiently clear which technical features the delivered Lely Astronaut milking machine and the arrangement comprised and whether the acquisition of the machine by Mr Lathouwers was an ordinary purchase.

Due to lack of sufficient proof, the Lely Astronaut milking machine of Mr Lathouwers cannot be considered as state of the art under Article 54(2).

Further points

If OII wishes to keep to the alleged prior uses, he is requested to file translations of the submitted written evidence into the language of the proceedings.

Furthermore, OII is requested to bring the originals of the written evidence to the proceedings so that these documents can be inspected if necessary.

It should be noted that both OI and OII have cited documents which were not used in their argumentation. These documents do not appear to be relevant and will therefore not be further considered

10 Article 100(b)

The opposition division is of the opinion that the European patent discloses the invention sufficiently clear and complete for it to be carried out by a person skilled in the art.

Opponent OI has alleged that the subject-matter of claim 11 cannot be carried by a skilled person, since it is not clear how the resting area should be designed in order to allow the large number of milking animals to move freely in said resting area, as the milking animals are not part of the claimed combination. This argument can, however, not be followed, since although there might be a clarity problem under Article 84 (which is not a ground for opposition) the skilled person would be able to design an area which would be suitable to allow this depending on the number of animals.

OI further raised the same objection concerning any of claims 12-16, since also here reference is made to the milking animals which are not part of the claimed combination. Also here the opposition division is of the opinion that the skilled person would be able to carry out the invention, as he would take the number of animals into consideration when designing the arrangement.

11 Article 100(c)

The opposition division is of the opinion that the European patent does not extend beyond the content of the application as filed.

The opponent OI argues that the patent in suit extends beyond the content of the application as filed, since claim 1 of the patent in suit (which is a combination of claim 1 and a part of claim 6 as published) contains, only a part of claim 6.

This argument cannot, however, be followed by the opposition division for the following reason:

Claim 6 as published reads as follows:

- said large number of milking animals are allowed to move about freely in said feeding area (3); and
- said device provided for directing includes a milking animal identification device (23) provided for identifying each milking animal presenting itself in front of said device provided for directing, and a device provided for opening at least one gate (21) depending on said milking animal identification.

The two features of the claim are not interrelated, as the first feature relates to how the animals can move in an area, and the second feature relates to identifying the animals.

Further the opponent OI argues that claim 6 as published referred back to claim 5 as published and therefore the subject-matter of claim 5 as published should also have been included in claim 1 as granted. Also this argument

cannot, however, be followed, since the features of claim 5 as published refer to the different areas and are therefore not linked to the features of claim 6 as published referring to the identification.

12 Article 100(a)

Novelty

OI argues that the subject-matter of claim 1 is not new in view of D6. During the oral proceedings it will inter alia have to be discussed whether or not the feature "a device provided for automatically directing each of the said milking animals moving towards said at least one of said resting area or said feeding area, which is partitioned in sections, into one of said sections depending on the group" is disclosed or not. In D6 the animals are weighed and divided after they leave the AMS (Automatic Milk System), the animals which are difficult to milk automatically and are ready to be milked are directed to the separation boxes, in which they wait for manual milking, see page 21. The other animals are directed to the feeding area. OI argues that the animals therefore are divided into different sections depending on which group they belong. It is noted that in D6 there are two separating devices: one at ES and one at W in figure 2 (page 20). Further it is noted that claim 1 does not appear to require the milking animals to be directed into the resting area without first passing the feeding area. Thus, at location W in figure 2 a separation of the milking animals into two separate resting areas might take place.

OI further argues that the subject-matter of claim 1 is not new in view of D8. This argument cannot however be followed, since the feature "a device provided for automatically directing each of the said milking animals moving towards said at least one of said resting area or said feeding area, which is partitioned in sections, into one of said sections depending on the group" is not disclosed. In D8 all the animals pass into the feeding area (4) after milking without being directed into different sections. From the feeding area (4) some animals are allowed into a subsection of the feeding area through a gate (32).

D30

OII argues that the subject-matter of claim 1 is not new in view of the prior use D30. The opposition division is of opinion that the object of the alleged public prior use "purchase of the milking machine by Mr Beenackers", i.e. the Lely Astronaut AMS, would comprise all technical features of claim 1, if the public prior use was proven (see reference to prior use D30 above, point 9).

D30 discloses (the reference refer to D30):

A computer-controlled arrangement for housing a large number of milking animals (see D30-4), each of which belongs to one of a plurality of groups (low production cows and high production cows), said arrangement comprising:

- a resting area (waiting area with cubicles) wherein the milking animals are allowed to rest;
- a feeding area wherein the milking animals are fed (D30-5A); and
- a milking area housing at least one milking robot (7) for milking the milking animals, wherein
 - at least one of said resting area and said feeding area is partitioned in sections (1A and 1B), the number of which corresponds to the number of said groups, to which said milking animals belong (D30-4 after milking the cows are separated into their group); and the arrangement further comprises
 - a device (D30-4 after milking, the cows are separated into two groups) provided for automatically directing each of said milking animals moving towards said at least one of said resting area and said feeding area, which is partitioned in sections, into one of said sections depending on the group, to which the respective milking animal belongs, so that each of said sections will house milking animals belonging to one only of said groups, wherein said device provided for directing includes a milking animal identification device provided for identifying each milking animal presenting itself in front of said device provided for directing (after milking the animals are directed into hi and low productivity cows), and a device provided for opening at least one gate depending on said milking animal identification.

Hence all the features of claim 1 is disclosed in prior use D30.

D31

OII further argues that the subject-matter of claim 1 is not new in view of the prior use D31. This argument cannot, however, be followed by the opposition division, since even if the prior use was proven, see point 9 above, then it still would not disclose all the features of claim 1. In fact D31 only discloses a drawing D31-4 without any linked explanation forming part of the disclosure. Therefore the D31 does not disclose the following features:

- 1- A computer controlled arrangement. D31 it only discloses milking robots.

2- A device provided for automatically directing each of said milking animals moving towards said at least one of said resting area and said feeding area.

3- said device provided for directing includes a milking animal identification device provided for identifying each milking animal presenting itself in front of said device provided for directing, and a device provided for opening at least one gate depending on said milking animal identification.

Consequently, even if the prior use D31 was proven, then it would not be novelty destroying to the subject-matter of claim 1.

OII further argues lack of novelty in view of D32. The opposition division follows the argument of the patentee, that there is no disclosure of a resting area or a feeding area being partitioned into sections with an identifying directing/selecting device.

13 Inventive step

OI argues that the subject-matter of claim 1 does not involve an inventive step in view of the combination of D1 and D9 or the combination of D11 and D10.

OII argues that the subject-matter of claim 1 does not involve an inventive step in view of the combination of D34 and any of D15-D18, D24, D8, D9, D26. OII also mentions a combination D18 and D20 as well as D18 with either of D16 or D17 in his arguments against inventive step.

The patentee argues that the subject-matter of claim 1 is inventive in view of all the mentioned combinations.

The opposition division is of the opinion that D1 is the closest prior art document.

D1 discloses (all references are to D1): A computer-controlled (23 is the computer area) arrangement for housing a large number of milking animals, each of which belongs to one of a plurality of groups, said arrangement comprising:

- a resting area (4-11) wherein the milking animals are allowed to rest;

- a feeding area (3) wherein the milking animals are fed; and
- a milking area (2) housing at least one milking robot for milking the milking animals, wherein
- said resting area (4-11) is partitioned in sections (4-11), the number of which corresponds to the number of said groups, to which said milking animals belong; and the arrangement further comprises
- a device (13 computer controlled doors) provided for automatically directing each of said milking animals moving towards said resting area (4-11), which is partitioned in sections (in this case eight sections), into one of said sections depending on the group, to which the respective milking animal belongs, so that each of said sections will house milking animals belonging to one only of said groups.

The subject-matter of claim 1 differs from the disclosure of D1 in that

- said device provided for directing includes a milking animal identification device (23) provided for identifying each milking animal presenting itself in front of said device provided for directing, and a device provided for opening at least one gate (21) depending on said milking animal identification.

The distinguishing features have the effect that milking animals having similar characteristics can be put into the same group, which again makes visitation easier and it also increases the milk production.

The objective technical problem solved by the invention is therefore how to optimise milk production and lower the costs.

D9 discloses (see page 9, lines 7-14 , claim 1 and figures) an apparatus for separating animals into at least two stalls the apparatus having an identification gate (44) and a control unit which interacts with a transponder carried by each animal.

14 Matter to be discussed at the oral proceedings.

In view of the above it appears to the opposition division that the main point of discussion will be that of inventive step in view of D1, as the closest prior art, and D9.

15 Final date for making submissions:

Datum
Date 14.03.2011
Date

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Feuille 13

Anmelde-Nr:
Application No: 04 706 911.7
Demande n°:

According to Rule 116 the final date for making written submissions is set to 4 months before the date of the oral proceedings.